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## Comment on Recent Cases

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CONSTITUTIONAL LAW: RIGHT OF A STATE TO DISCRIMINATE AGAINST ALIEN LABOR ON PUBLIC WORKS.—In *Heim v. McCall*<sup>1</sup> a New York statute prohibiting alien labor on public contracts was attacked in the interest of subjects of the King of Italy. The Italian treaty<sup>2</sup> assures to Italian aliens the rights and privileges of natives of the United States in respect of persons and property. The Fourteenth Amendment protects the rights of citizens of the

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<sup>1</sup> (1915), 36 Sup. Ct. Rep. 78.

<sup>2</sup> Italian Treaty of 1871, 17 Stat. at L. 845. See *Hauenstine v. Lynham* (1879), 100 U. S. 483, 25 L. Ed. 628.

United States and of persons in the United States. Viewed in connection with the term "native," "citizen" is certainly the broader and more inclusive word, and indeed the court assumed that the amendment was the measure and criterion of the treaty. But the statute was held valid notwithstanding the Constitution and the treaty.

There was clear precedent for the right of a state to regulate hours of labor on public works, and upon the leading case in that subject the court relied; but in *Atkin v. Kansas*,<sup>3</sup> the old balancing of rights between police power and private liberty of contract was in question, and the court said, "it cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in *any manner he may choose*." In other words, the case does not say that contractors have not a right to work for the state; it says they have no right to work in a particular manner, and it is regulation of manner, and not classification of persons, to which the decision looks.

The present case takes a significant step further, for it says that the state may classify *persons*. Now if this classification were under the police power, we should have a well established rule with which to test it—"substantial relation to a legitimate end."<sup>4</sup> But since there was no such relation in the present case, the court was forced to abandon the police power as a basis for the right to discriminate, and, in choosing another basis, it says that the state "has the same right in conducting its business that an individual has. . . . the right of an employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; the public character of the work."

The question instantly suggested is: May a state, by a law, discriminate among citizens of the United States? Would a law prohibiting the employment, on public contracts, of persons of African descent be valid? It is settled doctrine that an individual may so discriminate.<sup>5</sup> But it must be remembered that it is the individual's liberty that gives him the right to contract as he shall see fit, and the same constitutional sentence that assures him that liberty, restricts the state's right to make discriminatory laws, and while it is barely possible that a state acting administratively, (and not legislatively) might discriminate in making a particular contract,<sup>6</sup> a state *law* effecting a *rule* of discrimination is a precise violation of the Fourteenth Amendment.<sup>7</sup> The crucial point of

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<sup>3</sup> (1903), 191 U. S. 207, 24 Sup. Ct. Rep. 124, 48 L. Ed. 148.

<sup>4</sup> *Magoun v. Illinois Trust & Savings Bank* (1898), 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. Ed. 1037; *Ozan Lumber Co. v. Union Co. National Bank* (1907), 207 U. S. 25, 28 Sup. Ct. Rep. 89, 52 L. Ed. 195

<sup>5</sup> *Civil Rights Cases* (1883), 109 U. S. 3, 3 Sup. Ct. Rep. 18 27 L. Ed. 835.

<sup>6</sup> But see *Ex parte Virginia* (1880), 100 U. S. 339, 25 L. Ed. 676.

<sup>7</sup> *Civil Rights Cases, supra*.

the whole discussion is that it is a discriminatory law, and not a discriminating contract that is being attacked. It can scarcely be doubted that such a law, arbitrarily discriminating among citizens of the United States, could never be sustained on the state's right to contract as it sees fit.<sup>8</sup>

Is the petitioner in any other case under the treaty than under the Constitution? The court seems to say that he is not, but in order to put another leg under the doctrine of state freedom of contract, it adverts to another famous case<sup>9</sup> defining the privileges and immunities of citizens of the United States, as interpreted in the light of the same Italian treaty by a recent decision.<sup>10</sup> *Corfield v. Coryell* held that citizens of the United States have no inherent right in the common property of the citizens of any state, and that fish and game constitute such a common property. An Italian, deprived of his hunting privileges by a Pennsylvania statute, invoked the Italian treaty, and *Patsone v. Pennsylvania* decided no more than that it was only personal and property rights that the treaty guaranteed, and that the right to hunt was a property right of citizens of Pennsylvania only.

Now if there ever was an unequivocal decision of the Supreme Court it was that in the Slaughter House Cases<sup>11</sup> to the effect that the right to labor is a sacred property right, and if the present case is sound the inevitable conclusion is that the right to labor on a state contract is common property of citizens of the state alone. But even if this be true, while it might then be admitted that the state could exclude all but its own citizens, still, if it graciously gave others the privilege of participation, could it classify and discriminate among the objects of its beneficence, on any such basis as color, race or (in the face of a treaty guaranteeing equality not only of right but of *privilege*) alienage?<sup>12</sup>

H. S. J.

CONTRACTS: EXCUSE OF PERFORMANCE BY EXISTENCE OF CONDITION CAUSING UNFORESEEN EXPENSE.—In *Mineral Park Land Company v. Howard*,<sup>1</sup> the defendant contracted to take from the plaintiff's land all the gravel necessary for the construction of a certain bridge, and to pay an agreed rate per cubic yard. Although the land contained enough gravel for his purpose, he took only half the necessary amount, securing the remainder elsewhere. In

<sup>8</sup> *Baner v. Portland*, 5 Saw. 566, Fed. Cas. No. 777; *Kennett v. Chambers* (1852), 55 U. S. 38, 14 L. Ed. 321.

<sup>9</sup> *Corfield v. Coryell* (1823), 4 Wash. C. C. 371, Fed. Cas. No. 3230.

<sup>10</sup> *Patsone v. Pennsylvania* (1914), 232 U. S. 138, 34 Sup. Ct. Rep. 281, 58 L. Ed. 539.

<sup>11</sup> (1873), 16 Wall. 36, 21 L. Ed. 294.

<sup>12</sup> *Gandalfo v. Hartman* (1892), 49 Fed. 181; *In re Tiburcio Parrott* (1880), 1 Fed. 481.

<sup>1</sup> (March 21, 1916), 51 Cal. Dec. 356, 156 Pac. 458.